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No. 06-1196

IN THE

Supreme Court of the United States

KHALED A.F. AL ODAH, *et al.*
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT OMAR KHADR SUPPORTING PETITIONERS

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BRIEF FOR RESPONDENT SUPPORTING PETITIONERS[†]

STATEMENT OF THE CASE

Respondent Omar Khadr is one of only three persons to have been charged under the Military Commissions Act of 2006 ("MCA"), and the only person currently facing trial before a military commission whose case is before this Court. Respondent was also a juvenile—15 years old—when he was detained. His case raises important questions about the jurisdiction of military commissions to hear cases against juveniles and to try detainees for the newly-minted "war crimes" set forth in the MCA—and about the availability of the writ of habeas corpus to raise such fundamental jurisdictional questions in federal courts.

Respondent's case was originally joined with that of the Petitioners here. After he was detained, Respondent filed a petition for a writ of habeas corpus in the District Court for the District of Columbia, challenging his detention. His habeas petition was coordinated with the habeas petitions filed by Petitioners in this case, and Respondent was a party to the proceedings below. However, while Respondent's appeal was pending, Respondent was charged and set to face trial before a military commission. This development rendered his situation importantly different from that of the remaining Petitioners in this case.

As a result, when the Court of Appeals rendered the decision below, Respondent did not seek certiorari together with Petitioners. Instead, he filed a separate petition for certiorari, together with another detainee who is also facing trial before a military commission. This petition focused on the particular issues raised by habeas petitioners who seek to challenge the jurisdiction of military commissions, rather than (or in addition to) indefinite detention. Respondent's

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[†] Dennis Edney and Nathan Whitling, members of the bar of Canada and lawyers for Respondent, also contributed to this brief.

petition for certiorari was denied. However, because Respondent was a party to the decision below, this Court's rules permit him to file a brief in this proceeding. *See* Sup. Ct. R. 12.6.

Accordingly, Respondent now submits this brief in support of Petitioners, in order to draw this Court's attention to the potential implications of this case for habeas claims raised by detainees who, unlike Petitioners, have been charged under the MCA. The two classes of detainees—those who have not been charged, and those who have—are in certain respects similarly situated, and share an interest in having this Court reverse the D.C. Circuit's erroneous ruling below and hold that detainees at Guantanamo Bay are entitled to have their habeas petitions reviewed and adjudicated on the merits in United States federal court.

However, there are also respects in which the interests of these two classes of detainees are different. As the Court decides the questions before it, it should be mindful of the fundamental nature of Respondent Khadr's jurisdictional and constitutional challenges to the military commission proceedings against him—including claims against the jurisdiction of the tribunal over juveniles and application of the MCA to conduct that predated the Act, in violation of the *Ex Post Facto* Clause. Those claims, and claims like them, should not be barred at the door of the federal courthouse by a broad ruling precluding habeas corpus review. Respondent urges this Court, in deciding the issues related to detainees who have not been charged, to take care not to limit or jeopardize the potentially distinct habeas claims that may be raised by detainees facing trial before military commissions convened under the MCA.

A. Proceedings Before the District Court

Respondent was taken into custody by United States forces in Afghanistan in July of 2002, when he was 15 years old. In the fall of 2002, he was transferred to the United

States detention facility at Guantanamo Bay, Cuba, where he remains imprisoned to this day.

On July 2, 2004, in the wake of this Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004), Respondent's grandmother, acting as his next friend, filed a petition for writ of habeas corpus in the United States District Court for the District of Columbia. This petition challenged Respondent's classification as an "enemy combatant" and his ongoing detention by the United States military. Respondent's case was assigned to Judge Bates. Other Guantanamo detainees filed similar petitions that were assigned to other judges on the same district court. *See* Pet. App. 71.

In response, the Government filed a motion seeking to coordinate resolution of the legal issues common to all these cases. *See* Pet. App. 72. A committee of the D.C. District Court designated Judge Green to coordinate and manage the cases. *See id.* The relevant order and resolution provided that Judge Green would, with the consent of the transferring judges, rule on common procedural and substantive issues, but that the cases themselves would remain before the original assigned judges. *See id.* Further, any judges who did not agree with Judge Green's substantive decisions could resolve the issues in their assigned cases for themselves. *See id.* On September 21, 2004, Respondent's case was transferred to Judge Green for coordination and management.

Shortly thereafter, the Government filed a motion to dismiss in all the detainee cases pending before Judge Green. *See* Pet. App. 73. One judge, Judge Leon, elected to rule on the motion to dismiss in his cases himself. The remaining cases—including Respondent's case—remained before Judge Green for resolution of the motion. *See* Pet. App. 74. On January 31, 2005, Judge Green denied the Government's motion in part. She held that the petitioners had stated valid claims under the Fifth Amendment, and that some petitioners

had stated valid claims under the Third Geneva Convention, but granted the motion as to the petitioners' remaining claims. *See* Pet. App. 126. Both the Government and the petitioners appealed, and their appeals were heard together with an appeal from Judge Leon's cases, in which he had granted the Government's motion to dismiss in its entirety. *See* Pet. App. 2-3. Proceedings before the district court were stayed pending the resolution of these appeals. *See* Pet. App. 59.

B. Respondent's Military Commission Proceedings And Supplemental Habeas Petition

In November of 2005, while Respondent's appeal was pending before the D.C. Circuit, the Government charged Respondent with various crimes, including conspiracy, murder, attempted murder, and aiding the enemy, and referred him for trial before a military commission constituted under authority of the President's Military Order of November 13, 2001, and Military Commission Order Number 1 of August 31, 2005 ("MCO No. 1"). *See* Charges, *United States v. Khadr* (Military Commission Case No. 05-0008); Referral, *United States v. Khadr* (Military Commission Case No. 05-0008, filed Nov. 23, 2005).

On December 19, 2005, after obtaining the consent of the Government and leave of the court, Respondent filed a Supplemental Petition for Writ of Habeas Corpus ("Supplemental Petition") with Judge Bates. [1] This supplemental petition raised numerous challenges to the jurisdiction of the military commission convened to try Respondent. These included, among other things, challenges to the tribunal's exercise of subject matter jurisdiction based on the fact that the crimes charged were not recognized by the traditional law of war; challenges under the *Ex Post*

[1] This petition was filed under Rule 15(d) of the Federal Rules of Civil Procedure, which permits a plaintiff to supplement an already-filed pleading.

Facto Clause based on the fact that the offenses charged were defined after the conduct at issue occurred; and challenges to the exercise of jurisdiction over Respondent's person both as a minor and as a person presumptively entitled to prisoner-of-war status under the Third Geneva Convention (and therefore not amenable to military commission jurisdiction at all). *See* Supplemental Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, *O.K. v. Bush, et al.*, No. 1:04CV01136 (D.D.C. filed Dec. 14, 2005) at 16-22, 25-26. This supplemental petition has not been reviewed on the merits or adjudicated by Judge Bates.

Nor did this supplemental petition stay Respondent's military commission proceedings. Those proceedings continued until this Court released its decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), which held that military commissions convened under the authority of MCO No. 1 were illegal. Respondent nonetheless remained in pretrial segregation while the Government sought authorization for newly-constituted military commissions from Congress. In addition, Respondent's charges remained posted on the Department of Defense military commissions website.

In late 2006, Congress passed and the President signed the Military Commissions Act of 2006 ("MCA"), P.L. 109-366, 120 Stat. 2600, which, among other things, authorized the creation of military commissions to try detainees held at Guantanamo Bay. On February 2, 2007, based on this authorization, the Government preferred new military commission charges against Respondent, alleging several offenses made punishable under the MCA. Charge Sheet, *United States v. Khadr*, § III.5.e. ("Charge Sheet"). On April 24, 2007, the charges were referred to a military commission

for trial. *Id.* at § VI.8.c. Proceedings are currently underway.[2]

C. D.C. Circuit Proceedings

Meanwhile, Respondent's habeas petition—together with the coordinated petitions by Petitioners in this case—was proceeding through the D.C. Circuit. To take account of ongoing Supreme Court decisions and congressional enactments, the court heard two oral arguments and received four rounds of briefing in the cases. *See* Pet. App. 3. The last round of briefing concerned the effect of the MCA, which, in addition to establishing the procedures for convening military commissions referenced above, purported to amend the federal habeas statute, 28 U.S.C. § 2241, to strip federal court jurisdiction over any "application for writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." MCA § 7.[3]

In a consolidated brief, the detainees appealing from Judge Green's decision—including Respondent—argued that the review provisions of the Detainee Treatment Act of 2005 ("DTA"), P.L. 109-148, 119 Stat. 2680 (as amended by the MCA), did not provide an adequate substitute for habeas corpus. Among other things, the brief explained that the

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[2] The military commission dismissed the charges against Respondent without prejudice on June 4, 2007, finding that there had been no determination that Respondent was an *unlawful* enemy combatant, a prerequisite for military commission jurisdiction. *See* Order, *United States v. Khadr* (Military Commission June 4, 2007); Disposition of Prosecution Motion for Reconsideration, *United States v. Khadr* (Military Commission June 29, 2007); *see also* MCA § 3, § 948c. The Government has appealed this dismissal. Docketing Notice, *United States v. Khadr*, No. 07-001 (Ct. Mil. Comm'n Rev. July 11, 2007).

[3] Section 7 does not distinguish between habeas claims challenging detention by Executive branch officials and claims challenging the jurisdiction of military tribunals, such as those asserted in Respondent's Supplemental Petition.

DTA would not provide a detainee who had actually been charged with the ability to meaningfully challenge the jurisdiction of the military tribunal. *See* Guantanamo Detainees' Supplemental Brief Addressing the Military Commissions Act of 2006, *Al-Odah, et al. v. United States*, Nos. 05-5064, 05-5095 through 05-5116 (D.C. Cir. filed Nov. 1, 2006).

On February 20, 2007, the Court of Appeals issued its opinion in this case. *See* Pet. App. 22. The Court held that the MCA was intended to strip federal courts of jurisdiction to hear habeas petitions filed by detainees, including in pending cases. It further concluded that this jurisdiction stripping did not violate the Suspension Clause of the Constitution, because the scope of habeas relief protected by that Clause did not extend to aliens without property or presence in the United States, and because such aliens did not have constitutional rights at all, and so were not protected by Suspension Clause. *See id.* In its opinion, the Court of Appeals drew no distinction between detention-related habeas claims and claims relating to the jurisdiction of military commissions. Accordingly, if the Court of Appeals decision is permitted to stand, it will foreclose both habeas petitions challenging indefinite detention, and petitions challenging the jurisdiction and legality of military commissions.

D. Proceedings In This Court

On March 5, 2007, the Petitioners in this case filed their petition for a writ of certiorari. Respondent did not join. Instead, he filed a separate petition for certiorari on February 27, 2007, together with another Guantanamo detainee who had been charged and was facing trial before a military commission. This petition, in addition to discussing general issues related to the right of detainees at Guantanamo Bay to file habeas petitions, addressed issues that specifically related to habeas petitions challenging the jurisdiction of

military commissions to try detainees for offenses under the MCA.

Initially, both petitions were denied. However, on a motion for reconsideration, this Court granted Petitioners' petition for certiorari. As a party to the decision below, Respondent is entitled to file a brief in this proceeding. *See* Sup. Ct. R. 12.6. Respondent now submits this Brief for Respondent Supporting Petitioners, in order to bring to this Court's attention the respects in which the issues raised in this detention-related case may impact habeas petitions that challenge the jurisdiction of military commissions.[4]

SUMMARY OF ARGUMENT

I. Respondent agrees with Petitioners that the D.C. Circuit's decision must be reversed. Contrary to that court's holding, detainees at Guantanamo Bay have a constitutionally protected right to file petitions for a writ of habeas corpus, as well as other rights under the Constitution.

II. If this Court agrees that the right to file habeas petitions extends geographically to Guanatanamo Bay, it

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[4] Respondent has also filed a petition for review of a September 2004 determination by a Combatant Status Review Tribunal ("CSRT") that he is an "enemy combatant" The MCA makes such a determination both a prerequisite for military commission jurisdiction, *see* MCA § 3, § 948d(a), and "dispositive for purposes of jurisdiction for trial by military commission," MCA, § 3, § 948d(c). The MCA also provides that the D.C. Circuit can conduct a review of such a determination, pursuant to review provisions set forth in the Detainee Treatment Act ("DTA"). On May 23, 2007, Respondent petitioned the D.C. Circuit to declare that his CSRT determination was invalid, and also moved on an emergency basis for a stay of military commission proceedings pending resolution of his DTA claim. *See* Petition for Review, *Khadr v. Gates*, No. 07-1156 (D.C. Cir. filed May 23, 2007); Petitioner's Emergency Mot. to Stay Military Comm'n Proceedings and to Exceed Page Limits, *Khadr v. Gates*, No. 07-1156 (D.C. Cir. filed May 23, 2007). The court of appeals denied the stay, stating that it was "without jurisdiction" to grant the requested relief. *Khadr v. Gates*, No. 07-1156 (D.C. Cir. May 30, 2007) (order denying motion for emergency relief).

should confirm the uncontroversial point that the writ is available in principle to challenge not simply indefinite detention, as Petitioners correctly contend, but also the jurisdiction of military commissions. The availability of habeas for this purpose is firmly established in this Court's precedent, and in the writ's history.

III. Should this Court agree that Guanatanamo detainees have the right to file habeas petitions, it may then go on to consider (as Petitioners urge) whether the CSRT review procedures established by the MCA and DTA are an adequate substitute for habeas relief under *Swain v. Pressley*, 430 U.S. 372 (1977). Respondent agrees with Petitioners that these procedures are not an adequate substitute for habeas claims challenging indefinite detention, and therefore that the MCA constitutes an unconstitutional suspension of the writ of habeas corpus.

However, if this Court disagrees, Respondent urges the Court to reserve the separate question whether the procedures established by the MCA and DTA are an adequate substitute for habeas claims challenging the jurisdiction of military tribunals. As is explained below, the analysis of the relevant procedures is importantly different in the case of jurisdiction-related habeas claims, both because it implicates a different set of procedures and because the analysis of those procedures focuses on different considerations. Further, and related, the substantive rights Respondent and others challenging the jurisdiction of military commissions would seek to vindicate are different than the rights underlying habeas petitions that challenge indefinite detention. Because the rights and interests at issue in habeas challenges to military commission jurisdiction are—like those at issue in challenges to indefinite detention—deeply important, this Court should not foreclose such challenges without fully considering the question in a separate proceeding.

ARGUMENT

I. THE D.C. CIRCUIT'S DECISION SHOULD BE REVERSED

Respondent agrees with Petitioners that the D.C. Circuit's decision below was erroneous and should be reversed. As noted above, the court first held that the jurisdiction-stripping provision in Section 7 of the MCA—which purports to suspend the writ of habeas corpus for alien detainees who have been "determined by the United States to have been properly detained as [enemy combatants] or [are] awaiting such determination"—applies to pending cases. MCA § 7; *see* Pet. App. 6-10. The court then held that this purported suspension of the writ of habeas corpus does not violate the Suspension Clause, for two reasons. First, the court held that the Clause only protects the writ of habeas corpus as it existed in 1789, and further concluded that in 1789, the writ was not available to aliens overseas. *See* Pet. App. 10-15. Second, the court held, citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that aliens without property or presence in the United States have no constitutional rights, and so no right to the protection of the Suspension Clause. *See* Pet. App. 15-21. Accordingly, the court concluded that the MCA's jurisdiction-stripping is valid, and that there is no federal jurisdiction over habeas petitions filed by Guantanamo detainees. *See* Pet. App. 21.

As Petitioners explain, this decision is incorrect in multiple respects. Initially, Respondent agrees that Section 7 of the MCA should be interpreted not to apply to pending cases. But even if the statute is read to apply here, Respondent agrees that (as this Court's opinion in *Rasul* made clear) the writ of habeas corpus *was* available to aliens overseas in 1789, that habeas is available to aliens held on non-sovereign U.S. territory, and that *Johnson v. Eisentrager* is not to the contrary. Respondent further agrees that the Suspension Clause restrains Congress's ability to suspend the writ of habeas corpus even if detainees do not have

fundamental rights under the U.S. Constitution, and that in any event, detainees *do* have constitutional rights they can vindicate in habeas proceedings.[5] For all these reasons, as Petitioners argue, the D.C. Circuit's decisions must be reversed.

II. THIS COURT SHOULD CONFIRM THAT THE WRIT OF HABEAS CORPUS MAY BE USED TO CHALLENGE MILITARY COMMISSION JURISDICTION

If this Court agrees that the right to file habeas petitions extends geographically to detainees at Guantanamo Bay, it should confirm that the writ is available substantively not simply to challenge indefinite detention, as Petitioners correctly contend, but also to challenge the jurisdiction of military commissions established to try detainees who have been charged.

This should not be a controversial point. Indeed, last year, in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), this Court reviewed a habeas challenge brought by a Yemeni national, Salim Hamdan, who was being held at Guantanamo Bay and was facing trial before a military commission convened under MCO No. 1. *See id.* at 2759. Hamdan filed a habeas petition alleging that the commission lacked authority to try him for the offense charged, the crime of

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[5] Respondent's case implicates many of the same constitutional protections at issue in Petitioners' case: the protections afforded by the Suspension Clause, for example, and the fundamental rights of access to the courts, personal liberty, and due process of law. However, Respondent's case also implicates constitutional protections and rights not raised by Petitioners' claims, such as the protections of the *Ex Post Facto* Clause. *See* Part III.B.2 *infra*. Should this Court analyze in specific terms particular constitutional protections or rights that might apply to Petitioners, and conclude that Petitioners are not entitled to such protections or rights, it should take care not to foreclose the possibility that other detainees (such as Respondent) may be entitled to other constitutional protections or rights (such as the protections of the *Ex Post Facto* Clause) not implicated by Petitioners' cases.

"conspiracy," an offense that (as Hamdan established) "is not a violation of the law of war." *Id.* This Court concluded that the commission lacked the power to try Hamdan, and four Justices agreed that the offense of conspiracy was not an offense that could be tried by military commission. *Id.* at 2759-60.

There was *no* dispute in *Hamdan* that a habeas petition was an appropriate vehicle to challenge the authority of the military commission to try a prisoner for the offenses charged. [6] Indeed, the Court expressly observed that "Hamdan and the Government both have a compelling interest in knowing in advance whether Hamdan may be tried by a military commission that arguably is without any basis in law." *Id.* at 2772. It further observed that pre-trial consideration of military commission jurisdiction was fully consistent with its precedent, pointing to *Ex parte Quirin*, 317 U.S. 1 (1942), as "compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions." *Id.* at 2772 (internal quotation marks omitted). In *Quirin*, 317 U.S. at 25, this Court heard a habeas petition filed by enemy aliens challenging their impending trial before a military commission, and resolved the question whether that commission had "jurisdiction to try the charge preferred against petitioners." Similarly, in *In re Yamashita*, 327 U.S. 1, 8 (1946), this Court considered on habeas "the lawful power of the commission to try the petitioner for the offense charged."

These cases are consistent with long-standing historical practice. While Petitioners emphasize the historic availability of habeas corpus to challenge the Executive's power to detain, the writ has for centuries been used to test

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[6] The availability in principle of habeas for this purpose is a different question than whether the DTA or, now, the MCA—assuming they apply to pending cases—validly strip federal courts of their authority to hear such habeas petitions. *See* Part III *infra*.

and resolve basic jurisdictional questions.[7] In the American colonies and in the early Nineteenth Century United States, in fact, habeas was principally used as a pre-trial means of attacking jurisdiction.[8] And while the actions that sounded in habeas would gradually expand, the fundamental role of habeas corpus in resolving dispositive jurisdictional questions has never been in doubt.[9]

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[7] As a leading historian on habeas corpus has written, "[t]here can be little doubt . . . that habeas corpus in its cum cause form was being used for [testing the capacity of the tribunal] independently of privilege or certiorari by the mid-fifteenth century, and in 1433 there is a statute referring to the use." R.J. Sharpe, *The Law of Habeas Corpus* 5 (2d ed., Oxford Univ. Press 1989); *see also* Edward Jenks, *The Prerogative Writs in English Law*, 32 Yale L.J. 523, 525 (1923). In the early Seventeenth Century, Coke placed special emphasis on the use of the writ by the Kings Bench in overseeing inferior courts and "keep[ing] them within their proper jurisdiction." Sir Edward Coke, 4 Institutes of the Laws of England 1170 (1797 ed.). By the mid-Seventeenth Century, the writ had become so indispensable to reviewing the jurisdiction of executive tribunals that Parliament guaranteed it for that purpose in the Act for the Abolition of the Court of Star Chamber. 1641, 17 Car. 1. c. 10 § 6 (Eng.); *see also* Edward Jenks, *The Story of the* Habeas Corpus, 13 L.Q. Rev. 64, 74 (1902) ("In 1608 the Common Pleas, by its agency, rescued Sir Antony Rooper from the clutches of the Court of High Commission.").

[8] *See, e.g., Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807); *United States v. Hamilton*, 3 U.S. (3 Dall.) 17 (1795); *see also* Dallin H. Oaks, *Habeas Corpus in the States 1776-1865*, 32 U. Chi. L. Rev. 243, 258 (1965) ("In the Nineteenth Century, however, most petitions involving criminal commitments preceded conviction. In fact, many were submitted immediately upon the defendant's being arrested and before he was even brought before a judicial officer for formal commitment.").

[9] *See, e.g., Ex parte Mayfield*, 141 U.S. 107, 116 (1891); *Ex parte Yarbrough*, 110 U.S. 651, 653 (1884). In *the Federalist*, Hamilton points to habeas as a means of securing against "[a]rbitrary impeachments [and] arbitrary methods of prosecuting pretended offenses." The Federalist No. 83 (Alexander Hamilton). And in *Swain v. Pressley*, Chief Justice Burger observed that inquiring into "whether a committing court had proper jurisdiction" was part of habeas' common-law core. 430 U.S. 372, 385 (1977) (Burger, C.J., concurring).

Moreover, the writ has always been available—as it was in *Hamdan*, *Quirin*, and *Yamashita*—to resolve the legality of military jurisdiction.[10] Of particular relevance to Respondent's case, habeas has historically been the vehicle through which minors have been removed from military custody. Lawful recruitment into the military has long been an essential prerequisite to military jurisdiction, and habeas has ensured that those too young to lawfully agree to military status do not suffer its consequences.[11] Accordingly, if this

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[10] In the United Kingdom, it was through habeas corpus petitions that the common law courts reviewed whether military courts had lawfully exercised personal jurisdiction over a petitioner. *See The Case of Wolfe Tone*, 27 How. St. Tr. 614 (Irish K.B. 1798). Likewise, both in the context of the Civil War, *Ex parte McCardle*, 74 U.S. (6 Wall.) 506 (1869); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), and during the peak of World War II, *Ex parte Quirin*, 317 U.S. 1 (1942), as in *Hamdan*, this Court entertained pre-trial habeas petitions in order to resolve the legality of military jurisdiction.

[11] This practice dates back at least to 1758, when the Kings Bench heard the habeas petition of a minor who was charged before a court-martial. *Rex v. Parkins*, [1758] 2 Kenyon 295, 96 Eng. Rep. 1188. According to the case report, "[t]he question was, whether [the minor] was to be considered as a soldier?" The Kings Bench decided that because the minor's enlistment had been unlawful, he was not a soldier and thereby ordered him "out of the hands of the military." *Id.* In the United States, habeas has been used for similar purposes. *Commonwealth ex rel. Webster v. Fox*, 7 Pa. 336 (1847), for example, involved factual circumstances nearly identical to *Parkins*, and the court issued a writ of habeas corpus to release a minor "unlawfully enlisted and held without authority of law." This very basic habeas jurisdiction was available even to aliens. In *Commonwealth v. Harrison*, 11 Mass. 63, 66 (1814), a Russian minor enlisted in the military and he was discharged upon a petition for habeas corpus because the military had "no legal claim to the custody or control of him." This application of habeas jurisdiction was routinely applied to release minors from military custody, even from conflict zones, at a time when the enlistment age was as high as 21 and no lower than 18. *See In re McDonald*, 16 F. Cas. 33 (D. Mass. 1866) (No. 8752); *In re Higgins*, 16 Wis. 351 (1863); *Dabb's Case*, 21 How. Pr. 68, 12 Abb. Pr. 113 (1861); *Bamfield v. Abbot*, 2 F. Cas. 577 (D. Mass. 1847) (No. 832); *Commonwealth v. Downes*, 41 Mass. (24 Pick.) 227 (1836); *Commonwealth v. Callan*, 6 Binn. 255 (Pa. 1814).

Court reverses the Court of Appeals and holds that the right to file habeas petitions extends geographically to detainees held at Guantanamo Bay, it should confirm that the same right also is available in principle—as it traditionally has been—to challenge not simply detention, but also the jurisdiction of military commissions to try detainees.

III. THIS COURT SHOULD NOT HOLD OR SUGGEST THAT THE MCA OR DTA PROVIDE AN ADEQUATE SUBSTITUTE FOR HABEAS CHALLENGES TO MILITARY COMMISSION JURISDICTION

If this Court agrees with Petitioners that Guantanamo detainees have a right to file habeas petitions, and concludes that the MCA purports to strip federal courts of jurisdiction to hear such petitions, it may then choose (as Petitioners suggest) to consider whether the MCA effects an unconstitutional suspension of the writ of habeas corpus. The Constitution provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. The MCA contains no finding that the United States is in the midst of an invasion or insurrection, and there is no serious argument to be made in support of such a position. However, in *Swain v. Pressley*, 430 U.S. 372 (1977), this Court held that "the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus." *Id.* at 381. Accordingly, the central issue regarding the constitutionality of the MCA under the Suspension Clause is whether Congress, in enacting the MCA, provided an adequate and effective substitute for habeas corpus.

Respondent agrees with Petitioners that, with respect to detention-related claims, the MCA and DTA do not provide sufficient alternative procedures. But even if this Court were to disagree with Petitioners and hold that the MCA and DTA

do provide sufficient alternative procedures with respect to detention-related claims, it should *not* extend its holding to jurisdiction-related claims. Instead, it should expressly reserve the question whether the MCA provides sufficient alternative procedures with respect to habeas petitions challenging the jurisdiction of military commissions.

This is so because the analysis of the adequacy of the MCA as a substitute for habeas claims challenging military commission jurisdiction is importantly different in at least two respects than the analysis of the MCA and DTA as a substitute for habeas claims that challenge detention. First, the analysis of alternate procedures at issue is different. Second, and related, the potential issues that can be raised in a habeas petition—the rights ultimately to be vindicated—are also different.

A. The Analysis Of The Alternative Procedures With Respect To Jurisdiction-Related Habeas Claims Will Differ From The Analysis With Respect To Detention-Related Claims

Initially, the analysis of the alternate procedures Congress has provided under the MCA and DTA differs in numerous material respects in the cases of jurisdiction-related and detention-related habeas claims. Analysis of Petitioners' detention-related claims will focus on Section 7 of the MCA and the DTA review of CSRT determinations it incorporates by reference. *See* MCA § 7. Respondent believes Section 7 is also potentially relevant to jurisdiction-related claims, and has, as noted above, filed a DTA challenge to his CSRT determination as provided in Section 7 of the MCA. *See* note 4 *supra*. The Government, however, has disagreed, contending that while the DTA provides that the D.C. Circuit may review a CSRT determination for compliance with the Constitution and laws of the United States, such review is limited to laws that would limit the ability of the Government to detain—not try—Respondent. *See* Opposition to Petitioner's Emergency

Motion to Stay Military Commission Proceedings, *Khadr v. Gates*, No. 07-1156 (D.C. Cir. filed May 29, 2007) at 15-20. Thus, it is far from clear, particularly under the Government's interpretation of the DTA, that Respondent will be able to raise his substantive challenges to military commission jurisdiction in a DTA proceeding in the D.C. Circuit.[12] Any analysis of the adequacy of the MCA as an alternative procedure for raising jurisdiction-related habeas claims will therefore have to consider whether and to what extent Section 7 of the MCA is the relevant alternative procedure at all. That issue is not implicated by detention-related habeas claims.

The MCA also provides a procedure, set forth in Section 3, for post-judgment review of a military commission judgment in the D.C. Circuit. *See* MCA § 3(a)(1), § 950g. This procedure, of course, is not implicated in Petitioners' cases, as they have not been charged and are not facing proceedings before a military commission. Consideration of jurisdiction-related habeas claims, in contrast, will require an analysis of whether these procedures are an adequate substitute for habeas relief, particularly if the Government prevails in its position that Section 7 procedures are unavailable to challenge military commission jurisdiction.

A court will have to consider, for example, whether review under MCA Section 3 is an adequate substitute for habeas relief even thought it does not permit a detainee to present arguments against the exercise of military jurisdiction until *after* military commission proceedings have

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[12] In *Bismullah, et al. v. Gates*, No. 06-1197, 2007 U.S. App. LEXIS 18265 (D.C. Cir. July 30, 2007), the D.C. Circuit made clear that such DTA proceedings involve broader discovery and a less restrictive scope of review than was urged by the Government. However, *Bismullah* said nothing specific about the ability of detainees such as Respondent to present jurisdictional challenges to a federal court before the ordeal of trial by a military tribunal without jurisdiction.

taken place: the MCA only allows the D.C. Circuit to review "final decisions" of military commissions after trial, after approval by the convening authority, and after review by the so-called "Court of Military Commission Review." MCA § 3, § 950g(a). In *Hamdan*, this Court suggested that in order to be meaningful, federal court review of such arguments must take place before trial. *See Hamdan*, 126 S.Ct. at 2772; *see also Hamdan v. Rumsfeld*, 415 F.3d 33 at 36-37 (rejecting the Government's abstention arguments and observing that "setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction"). There is thus ample question whether MCA Section 3 can be an adequate substitute for jurisdiction-related habeas claims.

Similarly, a court considering whether the MCA violates the Suspension Clause in the context of jurisdiction-related habeas claims would have to consider whether the procedures set forth in MCA Section 3 permit a detainee to effectively challenge the military commission's personal jurisdiction. The MCA provides that a finding by a CSRT "that a person is an unlawful enemy combatant is dispositive for the purposes of jurisdiction for trial by military commission under this chapter." MCA § 3, § 948d(c). Thus, under the MCA, it appears that a military commission itself cannot consider a challenge to personal jurisdiction based on a claim that a CSRT determination was erroneous. The plain language of the statute also appears to preclude the Court of Appeals from addressing the issue on review of a military commission conviction. Accordingly, a court considering the adequacy of the MCA as a substitute for jurisdiction-based habeas challenges will have to consider whether the other avenues available to review CSRT determinations—the review procedures in Section 7 of the MCA and the DTA—permit a detainee to raise all valid challenges to personal jurisdiction, including (for example) those based on a detainee's status as a juvenile.

In short, analysis of the adequacy of the MCA and DTA procedures as a substitute for jurisdiction-based habeas petitions is a markedly different inquiry than analysis of their adequacy as an alternative to detention-based habeas petitions.

B. The Substantive Challenges At Issue Are Different Than Those Raised By Detention-Related Claims

In addition, the interests to be vindicated by a habeas petition challenging the jurisdiction of a military tribunal differ from those implicated by a detention-based petition. In particular, while Petitioners seek to challenge substantive infirmities in their detentions, Respondent seeks to vindicate his right not to be tried before a tribunal that lacks both subject-matter and personal jurisdiction to try him.

Respondent's jurisdictional claims are described briefly below, so that the Court may consider the substantial arguments that may be raised against the jurisdiction of MCA military tribunals. As the discussion will show, there are serious questions about whether the military tribunal before which Respondent is to be tried actually has jurisdiction to hear his case. And, as suggested above, there are also serious questions about whether the MCA and DTA review provisions would allow for full and meaningful review of Respondent's jurisdictional claims. Given the seriousness of these arguments, Respondent urges this Court not to foreclose federal habeas review of such jurisdictional claims—and certainly not in this case, where the issue has not been squarely presented or addressed.

1. The Military Commission Lacks Jurisdiction Over Respondent Because He Is A Juvenile

The MCA does not expressly grant military commissions personal jurisdiction over minors. Nor did Congress, in enacting the MCA, provide any indication that it intended to abrogate the extensive statutory framework that governs the prosecution of minors in federal custody under the Juvenile

Delinquency Act ("JDA"), 18 U.S.C. §§ 5031, *et. seq.* There is no reason to believe that Congress intended to subject minors such as Respondent to the jurisdiction of MCA military tribunals, rather than the procedures set forth in the JDA—particularly in the face of long-standing military law and policy conferring special status on minors and precluding court-martial jurisdiction over minors.

1. "The age of 18 is the point where society draws the line for many purposes between childhood and adulthood." *Roper v. Simmons*, 543 U.S. 551, 574 (2005). Consistent with this understanding, Congress, in the JDA, established specific and carefully considered procedures for the federal detention and prosecution of persons under the age of 18. Most important here, the JDA provides juveniles with a statutory right not to be tried as criminal defendants outside of its terms. *See* JDA, 18 U.S.C. §§ 5031, *et seq.*; *In re Sealed Case*, 893 F.2d 363, 367-68 (D.C. Cir. 1990).

The JDA governs the federal prosecution of juveniles in the military context as well as outside that context. The JDA is routinely invoked when juveniles are taken into federal custody in situations where there is no concurrent state jurisdiction—as is the case when a juvenile is taken into custody on a military base. *See* 18 U.S.C. § 5032(1).[13] Within the military, the JDA is understood as applying to the prosecution of anyone under eighteen who is not a member of U.S. forces and commits a criminal act overseas. *See* Operational Law Handbook, JA 422, 139 (2006). And because the JDA, like the federal habeas statute, 28 U.S.C. §

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[13] *See United States v. R. L. C.*, 503 U.S. 291 (1992) (juvenile held on Indian territory); *United States v. Jose D. L.*, 453 F.3d 1115 (9th Cir. 2006) (alien juvenile caught at border crossing); *United States v. Male Juvenile*, 280 F.3d 1008 (9th Cir. 2002) (juvenile held on Indian territory); *United States v. Juvenile (RRA-A)*, 229 F.3d 737 (9th Cir. 2000) (alien juvenile caught at border crossing); *United States v. Female Juvenile*, 103 F.3d 14 (5th Cir. 1996) (juvenile held on military base); *United States v. Juvenile Male*, 939 F.2d 321 (6th Cir. 1991) (juvenile held on military base).

2241, "draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship." *Id.* In fact, the JDA's provisions are recognized as applying equally to both legal and illegal aliens prosecuted for criminal conduct committed before the age of eighteen.[14]

The MCA does not expressly abrogate the JDA, nor provide any indication that Congress intended to override the specific statutory protections afforded juveniles by the JDA. Accordingly, the best reading of the entire statutory framework is that the JDA has not been repealed by implication, but instead continues to govern in the specific area of prosecution of juveniles. *See Branch v. Smith*, 538 U.S. 254, 273 (2003) ("[A]bsent 'a clearly established congressional intention, repeals by implication are not favored.' An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict', or where the latter act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'") (internal citations omitted). The well-established presumption against repeal by implication applies with special force here, where Congress has not hesitated to specify, clearly and expressly, the preexisting procedures that *are* overridden by the MCA. *See, e.g.*, MCA § 4, 10 U.S.C. § 948b.

2. The exercise of personal jurisdiction over former child soldiers by military commissions is inconsistent not only with the immediate statutory framework, but also with longstanding military law and policy. It is especially unlikely that Congress would extend the military commissions' jurisdiction to minors *sub silentio* given that

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[14] *See United States v. C.M.*, 485 F.3d 492 (9th Cir. 2007); *United States v. Jose D. L.*, 453 F.3d 1115, (9th Cir. 2006); *United States v. Juvenile (RRA-A)*, 229 F.3d 737 (9th Cir. 2000); *United States v. Juvenile Male*, 74 F.3d 526 (4th Cir. 1996); *United States v. Doe*, 862 F.2d 776, 799 (9th Cir. 1988); *United States v. Doe*, 701 F.2d 819 (9th Cir. 1983).

such jurisdiction would be contrary to the treatment of juveniles under other aspects of military law.

Most fundamentally, under military law, courts-martial do not have personal jurisdiction over minors. Though the Uniform Code of Military Justice ("UCMJ") does not specify a minimum age for personal jurisdiction, the United States Court of Appeals for the Armed Forces has long held that a court-martial lacks jurisdiction over minors in most instances. *See United States v. Blanton*, 7 C.M.A. 664 (1957); *United States v. Brown*, 23 C.M.A. 162 (1974). As a general matter, and absent some explicit direction, Congress should not be understood to have adopted a military tribunal system contrary to that well-established cannon of military law. But that is especially true here, where Congress expressly made the UCMJ the model for MCA military commissions, *see* MCA § 3, 10 U.S.C. § 948b(c) ("The procedures for military commissions set forth in this chapter are based upon the procedures for trial by general courts-martial under [the UCMJ]"), and specifically identified those provisions of the UCMJ that it did *not* wish to govern under the MCA, *see, e.g.*, MCA §§ 3, 4(a)(2); 10 U.S.C. §§ 821, 828, 848, 850, 904, 906, 948b(d).

"Where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard, Div. of Loewe's Theaters, Inc. v. Pons*, 434 U.S. 575, 581 (1978); *see also, e.g., Whitfield v. United States*, 543 U.S. 209 (2005). Congress would have known that under the UCJM, courts-martial have no jurisdiction over minors—but that age limit is *not* among the features of the UCJM that Congress singled out as inapplicable to military tribunals under the MCA. Under fifty years of precedent from the nation's highest military court, military trials—whether by court-martial or ad hoc commission—are adult proceedings that presume defendants

had the capacity to take on the special status that subjects them to military jurisdiction, whether as members of the "military establishment" or as "enemy combatants." All indications are that Congress intended to leave that precedent undisturbed, and to delineate the personal jurisdiction of MCA commissions in a manner consistent with well-established military law.[15]

2. The Military Commission Lacks Jurisdiction To Hear the Offenses With Which Respondent Has Been Charged

The military commission before which Respondent faces trial also lacks subject-matter jurisdiction to hear the charges against him. It is undisputed that a military commission can assume jurisdiction only over crimes of war. *See Hamdan*, 126 S. Ct. at 2777-81 (plurality op.) (conspiracy not a war crime, and thus not triable by military commission). At the time Respondent is alleged to have committed the five offenses with which he is charged, not one of them qualified as a crime of war. Like the conspiracy charge at issue in *Hamdan*, none of those offenses "appear[s] in either the Geneva Conventions or the Hague Conventions—the major treaties on the law of war." *Id.* at 2781. Nor are the offenses triable by the International Criminal Court under the Rome Statute, which "provides the most comprehensive, definitive and authoritative list of war crimes." Robert Cryer, *International Criminal Law v. State Sovereignty:*

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[15] Military policy accords special status to minors in other respects as well. For instance, minors are included in a specially protected class of detainees (along with religious figures and women) who are accorded special "dignity and respect" and must be housed separately from adult male detainees. *See* First Marine Division, Detainee Handling and Detention Facility SOP §§ 1(c)(3)(a), 2(c)(4) (Oct. 1, 2004). Similarly, United States policy in Afghanistan condemns the use of "child soldiers," conditioning support for the Afghan army on prohibition of the use of child soldiers or combatants. Afghanistan Freedom Support Act of 2002, Pub. L. 107-327, 116 Stat. 2797 (Dec. 4, 2002).

Another Round?, 16 Eur. J. Int'l L. (5th issue) 979, 990 (2005).

Congress may "positively identif[y]" particular offenses as crimes of war, *Hamdan*, 126 S. Ct. at 2749, and the Military Commissions Act purports to make the offenses with which Respondent is charged triable by MCA commissions. But that Act—signed into law in 2006, four years *after* Respondent was taken into custody—cannot be the basis for jurisdiction here: application of the MCA to Respondent's pre-MCA conduct would violate United States (and international-law) prohibitions on *ex post facto* laws.

1. Respondent is charged with five offenses: murder, attempted murder, conspiracy, providing material support for terrorism, and spying in violation of the MCA. Charge Sheet (Apr. 24, 2007). None of the charged offenses was a crime of war or otherwise triable by a military commission when Respondent is alleged to have committed the offenses, sometime before he was taken into custody in 2002.

As noted above, the offenses in question do not appear in the "major treaties on the law of war," *Hamdan*, 126 S. Ct. at 2781, and are not triable by the International Criminal Court as war crimes. *See supra* at 24. Prior to the MCA, no congressional statute purported to define these offenses as crimes of war.[16] As this Court held in *Hamdan*, when an offense is not defined as a war crime by treaty or statute, "the precedent [for trial by military commission] must be plain

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[16] During the relevant time period, the Uniform Code of Military Justice ("UCMJ") did identify spying as an offense triable by military commission. *See* 10 U.S.C. § 906. But Respondent is not charged with the UCMJ offense of spying, which requires, *inter alia*, (a) some "clandestine" action (b) taken during a time of war—requirements that could not be met in Respondent's case. Instead, he is charged with spying under the MCA, which defines the offense more broadly and omits the two key UCMJ requirements noted above. Until passage of the MCA, however, the broader spying offense with which Respondent is actually charged was not a crime of war and was not triable by a military commission.

and unambiguous" before jurisdiction may vest in a military commission. *Id.* at 2780. But here, there is no "plain and unambiguous precedent." To the contrary: prior to the enactment of the MCA in 2006, no international tribunal or American military commission had ever charged an individual with the offenses at issue here. In short, at the time Respondent allegedly committed his offenses, there was no basis for categorizing those offenses as "war crimes" giving rise to military commission jurisdiction.

2. On October 17, 2006—more than four years after Respondent was taken into custody—the President signed into law the MCA, which expands the group of offenses triable as war crimes by military commissions. *Cf. Hamdan*, 126 S. Ct. at 2749 (discussing Congress' constitutional authority to define crimes of war by statute). The charges against Respondent appear to correspond to offenses newly identified as crimes of war by the MCA. But that does not solve the jurisdictional problem here. Instead, it raises a new and serious constitutional problem: any attempt to apply the MCA to Respondent's pre-MCA conduct would violate the Constitution's *Ex Post Facto* Clause, U.S. Const. art. I, § 9, cl. 3.

The *Ex Post Facto* Clause prohibits Congress from enacting criminal laws with certain retroactive effects, *see Stogner v. California*, 539 U.S. 607 (2003)—here, from retroactively subjecting Respondent to the jurisdiction of a military commission and threat of punishment on the basis of offenses that were not crimes of war when they allegedly were committed. Using the MCA to prosecute as war crimes conduct that did not give rise to war-crime liability when it occurred would defeat the central purpose of the *Ex Post Facto* Clause: to ensure that "legislative Acts give fair warning of their effect and permit individuals to rely on their

meaning until explicitly changed," *see Weaver v. Graham*, 450 U.S. 24, 28-29 (1981).[17]

The *Ex Post Facto* Clause operates directly on Congress, prohibiting the *passage* of any *ex post facto* law and thus "restraining arbitrary and potentially vindictive legislation" and "confining the legislature to penal decisions with prospective effect." *See id.* at 29 n.10. Any act in violation of the prohibition against *ex post facto* laws is void, and cannot operate as the basis for jurisdiction. *Downes v. Bidwell*, 182 U.S. 244, 277 (1901) ("[W]hen the Constitution declares that 'no bill of attainder or ex post facto law shall be passed,' . . . it goes to the competency of Congress to pass a bill of that description.").[18]

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[17] The fact that Section 3 of the MCA states that the offenses it lists are "declarative of existing law," MCA § 3, § 950p, does not cure this problem: as discussed above, that statement is false, and Congress cannot avoid *ex post facto* scrutiny of its enactments simply by declaring that they do not violate the *Ex Post Facto* Clause.

[18] The United States is not alone in its treatment of *ex post facto* laws. International law also prohibits charging individuals with "any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed." International Covenant on Civil and Political Rights, art. 15(1), Mar. 23, 1976, 999 U.N.T.S. 171 (ratified by U.S. on June 8, 1992) ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts ("Protocol I"), art. 75(4)(c), Dec. 7, 1978, 1125 U.N.T.S. 3 ("No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed.") (recognized as customary international law by the U.S. in W. Hays Parks et al., Unclassified Memorandum for Mr. John H. McNeill, Assistant General Counsel (International), OSD (May 8, 1986) (entitled 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications); *Prosecutor v. Delalić et. al.*, Case No. IT-96-21-T, ICTY Trial Chamber Judgment, ¶ 313 (Nov. 16, 1998) (explaining prohibition on retroactive application of criminal laws

Indeed, even the military commission system invalidated in *Hamdan* recognized that individuals could not be tried before military commissions for offenses that did not exist when they allegedly were committed. MCI No. 2 ¶ 3(A) ("No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question."). Because it is not within the competency of Congress to pass an *ex post facto* law, Respondent may not be tried by a military commission for offenses designated as "war crimes" for the first time on October 17, 2006, four years after Respondent was detained.

3. The Military Commission Lacks Jurisdiction Because Respondent Has Presumptive Prisoner-of-War Status, Which Requires Trial By Court-Martial

Even if a court were to reject both of the preceding arguments, Respondent still would not be subject to the jurisdiction of a military commission. Respondent is entitled to assert that he is a prisoner of war.[19] Unless and until a competent tribunal determines otherwise, that is enough to entitle Respondent to the procedural protections afforded prisoners of war—including the right to be tried by a court-martial.

Every belligerent taken prisoner during armed conflict "must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, [or] a civilian covered by the Fourth Convention. . . . There is no intermediate status; nobody in enemy hands can be outside the law." International Committee of the Red Cross, *Commentary on the Geneva Conventions of 12 August 1949: IV Geneva Convention*

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for acts that an individual reasonably believed to be lawful at the time of their commission).

[19] *See* Department of the Army Field Manual 27-10, The Law of Land Warfare ¶¶ 62, 71(b) (July 1956) ("1956 Army Field Manual 27-10").

Relative to the Protection of Civilian Persons in Time of War p. 51 (Jean S. Pictet ed., 1958).[20] Designation as a prisoner of war is crucial, because prisoners of war held by the United States may only be tried by court-martial. The Geneva Convention III Relative to the Treatment of Prisoners of War ("GPW"), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 102.

It is well-established that when "any doubt arise[s]" as to whether a person who has "fallen into the hands of the enemy" is a prisoner of war, the person must be afforded prisoner-of-war status "until such time as their status has been determined by a competent tribunal." GPW, art. 5(2); *see also Hamdi*, 542 U.S. at 550 (Souter, J. and Ginsburg, J., concurring in part, dissenting in part, and concurring in judgment) (Third Geneva Convention requires "that even in cases of doubt, captives are entitled to be treated as prisoners of war 'until such time as their status has been determined by a competent tribunal'"). Moreover, such doubt arises whenever a detainee claims prisoner-of-war status. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 162 (D.D.C. 2004), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd*, 126 S. Ct. 2749 (2006), (quoting Army Regulation 190-8, § 1-6(a)) (citing *Hamdi*, 542 U.S. at 550 (Souter, J. and Ginsburg, J., concurring in part, dissenting in part, and concurring in judgment)).

That principal is well-rooted in customary international law as well as the military's governing regulations. *See, e.g.*, Protocol I (imposing a presumption that a person in the hands of an adverse party who claims to be a prisoner of war shall be considered a prisoner of war "until such time as his status has been determined by a competent tribunal.");[21]

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[20] *See also* The Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[21] Although the U.S. has not signed Protocol I, State Department statements regarding this provision show that these principles constitute

United States Central Command Regulation No. 27-13 ¶ 7(a)(2) (Feb. 7, 1995) (regulations governing the U.S. military's Area of Operations that includes Afghanistan and Iraq, instructing that "the protections of the GPW [be applied] . . . to each detainee whose status has not yet been determined by a Tribunal covered under this regulation."); Department of the Army Field Manual 27-10, The Law of Land Warfare ¶ 71(b) (July 1956) (GPW, art. 5 "applies to any person not appearing to be entitled to prisoner-of-war status . . . who asserts that he is entitled to treatment as a prisoner of war or concerning whom any other doubt of a like nature exists.").[22]

In short, unless and until the government convenes a competent tribunal to determine whether Respondent is a prisoner of war, it must presume that he has that status and afford him all corresponding procedural protections,

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customary law recognized by the United States. *See* Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to The 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U.J. Int'l L & Pol'y 415, 421-22 (1987) (presented at the Sixth Annual American Red Cross—Washington College of Law Conference on International Humanitarian Law and the 1977 Protocols Additional to the 1949 Geneva Conventions). Speaking for the State Department, Mr. Matheson stated:

> [W]e [the United States] do support the principle that, should any doubt arise as to whether a person is entitled to combatant status, he be so treated until his status has been determined by a competent tribunal, as well as the principle that if a person who has fallen into the power of an adversary is not held as a prisoner of war and is to be tried for an offense arising out of the hostilities, he should have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated.

Id. at 425-26.

[22] The MCA purports to bar detainees from raising claims under the Geneva Conventions. *See* MCA § 3, § 948b(g). As Petitioners explain in their brief, this bar is invalid. But in any event, as discussed, customary international law provides an independent basis for affording full prisoner-of-war status to prisoners who have not had their status reviewed by a competent tribunal.

including the right to be tried by a court-martial rather than a military commission. But without access to habeas, Respondent would have no means of raising issues related to his status and the personal jurisdiction of a military tribunal to try him.

* * * *

In sum, there are, at the least, serious questions as to whether Respondent may be subjected to the jurisdiction of a military commission. The questions raised by Omar Khadr's case are of the most fundamental order, going to the very authority of a tribunal over those brought before it. Resolving such foundational disputes is at the heart of habeas corpus review, and this Court should reverse the decision below and hold that the federal courts remain open to the claims of Respondent and those like him. Even if the Court concludes that the MCA and DTA provide adequate alternate procedures to substitute for habeas in the context of Petitioners' detention-related claims, it should not hold or imply that those procedures are similarly adequate for the markedly different jurisdictional challenges Respondent would bring.

CONCLUSION

For the foregoing reasons, the judgment of the D.C. Circuit should be reversed.

Respectfully submitted,

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